

Boston College Environmental Affairs Law Review

Volume 39

Issue 3 *Electronic Supplement*

Article 6

9-4-2012

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Recommended Citation

Sara Mattern, *FYI to the FAA on FLL: Approval of a Runway Extension in City of Dania Beach*, 39 B.C. Env'tl. Aff. L. Rev. E. Supp. 69 (2012),
<http://lawdigitalcommons.bc.edu/ealr/vol39/iss3/6>

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FYI TO THE FAA ON FLL: APPROVAL OF A RUNWAY EXTENSION IN *CITY OF DANIA BEACH*

SARA MATTERN*

Abstract: The Airport and Airway Improvement Act requires the Federal Aviation Administration to review project applications for airport development projects. Under the Act, FAA must prioritize a more environmentally preferable alternative unless it is not prudent. In *City of Dania Beach v. FAA*, the court upheld the agency's definition of prudent, although it differed from the Supreme Court's definition of the word under the Department of Transportation Act in *Citizens to Preserve Overton Park v. Volpe*. This Comment argues that the case law on administrative deference supports the court's decision and that a general scheme of regulatory flexibility will be environmentally beneficial.

INTRODUCTION

Fort Lauderdale Hollywood-International Airport (FLL), owned by Broward County, Florida, increasingly experiences delays and congestion.¹ The airport is a large hub and has the 22nd largest yearly passenger traffic of any U.S. airport.² In a 2004 study, the Federal Aviation Administration (FAA) identified FLL as one of the thirty-five busiest airports in the United States.³ Another FAA study in 2007 recognized the need for additional capacity at FLL by 2015.⁴

After reviewing a 2005 project grant application from Broward County to improve airport capacity, FAA approved a development plan

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2011–12.

¹ *City of Dania Beach v. FAA*, 628 F.3d 581, 583 (D.C. Cir. 2010).

² FAA, NATIONAL PLAN OF INTEGRATED AIRPORT SYSTEMS (NPIAS) (2011–2015) 23 (2010), *available at* http://www.faa.gov/airports/planning_capacity/npis/reports/media/2011/npis_2011_narrative.pdf; *Statistics*, FORT LAUDERDALE-HOLLYWOOD INT'L AIRPORT, <http://www.broward.org/AIRPORT/ABOUT/Pages/Statistics.aspx>.

³ FAA ET AL., AIRPORT CAPACITY BENCHMARK REPORT 2004, at 6 (2004), *available at* http://www.faa.gov/airports/airport_development/omp/funding/PFC_06-19C-00-ORD_ADMIN_REC/MEDIA/DOC-032.pdf.

⁴ FAA, CAPACITY NEEDS IN THE NATIONAL AIRSPACE SYSTEM 2007–2025, at 41–42 (2007), *available at* http://www.faa.gov/airports/resources/publications/reports/media/fact_2_appendices.pdf.

that would extend one of the airport's existing runways.⁵ FAA approved an alternative that would better reduce delays and improve capacity after determining that a more environmentally preferable option to build a new runway was not prudent under the relevant statute.⁶

Tasked with overseeing the development and improvement of U.S. airports by Congress, FAA must consider the environmental impact of airport development projects, including a runway construction or extension.⁷ Pursuant to the Airport and Airway Improvement Act of 1982 (AAIA), FAA may approve a project grant application with a "significant adverse effect on natural resources . . . only after finding that no possible and prudent alternative to the project exists"⁸ In reviewing the environmental impacts of proposed alternatives, FAA also must ensure the project will increase passenger and cargo capacity and decrease delays.⁹

Although a term such as "prudent" may be ambiguous, petitioners in *City of Dania Beach v. FAA* challenged FAA's interpretation of the term, arguing its definition was controlled by the Supreme Court's definition of "prudent" in *Citizens to Preserve Overton Park v. Volpe*.¹⁰ The majority's decision to allow FAA to use its more lax definition of "prudent" permits a slightly more environmentally damaging alternative in this case.¹¹ Avoiding development of rigid statutory definitions of arguably vague words, however, will likely benefit environmental protections more generally.¹² By promoting regulatory flexibility, agencies can develop more tailored project evaluations based on their expertise in the field.¹³

⁵ *City of Dania Beach*, 628 F.3d at 583, 590.

⁶ *Id.* at 583, 591.

⁷ 49 U.S.C. § 47106(c)(1) (2006); see FAA, RECORD OF DECISION: THE DEVELOPMENT AND EXPANSION OF RUNWAY 9R/27L AND OTHER ASSOCIATED AIRPORT PROJECTS AT FORT LAUDERDALE-HOLLYWOOD INTERNATIONAL AIRPORT BROWARD COUNTY, FLORIDA 9-10 (2008), available at http://www.faa.gov/airports/environmental/records_decision/media/rod_fl109_main.pdf [hereinafter ROD].

⁸ 49 U.S.C. § 47106(c)(1)(B).

⁹ See 49 U.S.C. § 47101(a).

¹⁰ See *City of Dania Beach*, 628 F.3d at 584.

¹¹ See *id.* at 583.

¹² See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005).

¹³ See *id.*

I. FACTS AND PROCEDURAL HISTORY

As early as 1996, Broward County worked with FAA to develop an Environmental Impact Statement (EIS) for a runway extension.¹⁴ Although FAA and Broward County conducted evaluations and examined the possibility for airport expansion numerous times, a 2005 EIS provided the basis for the alternatives debated in *City of Dania Beach*.¹⁵

Currently, FLL has three runways: two running parallel east to west and a third connecting the two diagonally.¹⁶ Broward County brought its petition to FAA after determining that extending the southern runway and decommissioning the diagonal runway would meet its goals of additional capacity and decreased delay.¹⁷ The county's preferred expansion plan became Alternative B1c, one of a number of alternatives considered by FAA in its review.¹⁸

After public meetings, workshops, and reviewing public comments, FAA released a final EIS evaluating the proposed alternatives in June 2008 and a Record of Decision in December 2008.¹⁹ Both documents favored Alternative B1b, which contained the same physical characteristics as Broward County's proposed option—Alternative B1c—but included different noise mitigation actions.²⁰ Alternative B1b would destroy 15.41 acres of wetlands, including 3.05 acres of mangrove wetland.²¹ Despite the presence of the more environmentally friendly Alternative C1—which would destroy 15.40 acres of wetlands, but spare mangrove wetlands—FAA determined its adoption to be imprudent under § 47106(c)(1)(B) of the AAIA.²² FAA also found that neither option implicated the resources covered by § 4(f) of the Department of Transportation Act discussed in *Overton Park*.²³

The cities of Dania Beach and Hollywood, Florida—both south of FLL—participated in the comment process, opposing the adoption of Alternative B1b, which would extend the southernmost runway and

¹⁴ *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010).

¹⁵ *Id.*

¹⁶ *Id.* at 583.

¹⁷ *See id.* at 583, 588.

¹⁸ ROD, *supra* note 7, at 11.

¹⁹ *Id.* at 85–86.

²⁰ *Id.* at 13, 36, 51.

²¹ *Id.* at 28.

²² *See* 49 U.S.C. § 47106(c)(1)(B) (2006); ROD, *supra* note 7, at 9–10, 47–48.

²³ *See* *Citizens to Preserve Overton Park, Inc. v. Volpe* (*Overton Park*), 401 U.S. 402, 404 (1971); ROD, *supra* note 7, at 27–28, 32.

allow larger commercial aircraft to use the airport.²⁴ Instead, the cities preferred Alternative C1, which required constructing a new runway north of the existing runways.²⁵ Dania Beach challenged FAA's dismissal of Alternative C1 in its comments on the 2008 EIS, contending that because the environmentally preferred alternative met the project purposes and need, FAA should adopt it based on environmental and cost considerations.²⁶ In its response, FAA defended selection of a more environmentally damaging alternative.²⁷ While Alternative C1 could be a reasonable alternative that potentially met the project's purpose and need, FAA noted it would result in the lowest practical capacity and highest delays of all options considered.²⁸

Unable to convince FAA to adopt Alternative C1 through administrative channels, the cities of Dania Beach and Hollywood, and a number of individuals, filed petitions for review of FAA's grant of approval in the United States Court of Appeals for the District of Columbia.²⁹ In their complaint, petitioners challenged FAA's decision to dismiss Alternative C1 as imprudent under § 47106(c)(1)(B).³⁰

Petitioners claimed such a finding was barred by the Supreme Court's interpretation of the term "prudent" in *Overton Park*.³¹ They reasoned the term should have the same meaning under both § 47106(c)(1)(B) and § 4(f) of the Department of Transportation (DOT) Act.³² If the two uses of the word had the same definition, only "truly unusual factors" would allow FAA to find an option imprudent.³³ The petitioners also relied on FAA's own regulations regarding EISs that seemed to define "prudent" using language indicating a high bar for finding an option imprudent.³⁴

²⁴ ROD, *supra* note 7, at 101; see FAA, RECORD OF DECISION: THE DEVELOPMENT AND EXPANSION OF RUNWAY 9R/27L AND OTHER ASSOCIATED AIRPORT PROJECTS AT FORT LAUDERDALE-HOLLYWOOD INTERNATIONAL AIRPORT, APPENDIX A—COMMENTS RECEIVED & FAA RESPONSES ON THE FINAL EIS, at A.3–1, 4–6 (2008), available at http://www.faa.gov/airports/environmental/records_decision/media/rod_fl09_Appendix_a_index_9.pdf [hereinafter APPENDIX A].

²⁵ *City of Dania Beach*, 628 F.3d at 583.

²⁶ APPENDIX A, *supra* note 24, at A.3–9.

²⁷ *City of Dania Beach*, 628 F.3d at 588.

²⁸ ROD, *supra* note 7, at 46–47; see *City of Dania Beach*, 628 F.3d at 588.

²⁹ *City of Dania Beach*, 628 F.3d at 583.

³⁰ *Id.* at 584.

³¹ *Id.* at 584, 586.

³² *Id.* at 586.

³³ See *Overton Park*, 401 U.S. at 413; *City of Dania Beach*, 628 F.3d at 586.

³⁴ See *City of Dania Beach*, 628 F.3d at 586.

II. LEGAL BACKGROUND

Under the National Environmental Policy Act of 1969 (NEPA), all federal agencies must prepare an EIS for any major federal action that will affect the environment.³⁵ The EIS must include alternatives to the proposed project, unavoidable harmful impacts, and assurance of the project's sustainable use of the environment.³⁶ NEPA mandates a procedure for federal entities and is intended to bring environmental consequences to the forefront of all major agency actions.³⁷ Through increased visibility and community awareness, NEPA can lead to adoption of environmentally preferable choices.³⁸

Other statutes can direct how agencies select a preferred alternative in developing an EIS, as required by NEPA.³⁹ For example, § 4(f) of the Department of Transportation Act—applying to public parks, recreation areas, wildlife refuges, and some other publicly owned lands—restricts DOT from using such land unless “no feasible and prudent alternative” exists.⁴⁰ In *Overton Park*, the Supreme Court found § 4(f)’s language prohibited use of such land absent “truly unusual factors.”⁴¹ The Court reasoned that Congress intended to afford special protection to parks, as such lands lacked a built-in constituency who would be directly injured by its use for a highway project.⁴²

In the AAIA, Congress directed the manner in which FAA evaluates an EIS of a runway extension.⁴³ In § 47106, Congress specified that FAA must select the environmentally preferred alternative unless “no possible and prudent alternative to the project exists and . . . every reasonable step has been taken to minimize the adverse effect[s].”⁴⁴ By requiring FAA to choose the most environmentally friendly option, Congress signaled that agency decision-making should be constrained by environmental considerations to the extent possible and prudent to

³⁵ 43 U.S.C. § 4332(C) (2006).

³⁶ *Id.*

³⁷ See *Citizens Against Burlington, Inc. v. Busey*, 938 F.3d 190, 193–94 (D.C. Cir. 1991).

³⁸ See *Natural Res. Def. Council v. FAA (NRDC)*, 564 F.3d 549, 556 (2d Cir. 2009); *Busey*, 938 F.3d at 193–94.

³⁹ See, e.g., 49 U.S.C. § 303 (2006); 49 U.S.C. § 47106(c)(1)(B) (2006); *Busey*, 938 F.3d at 206 (discussing NEPA’s procedural requirement for developing alternatives and AAIA’s substantive requirement for selecting a preferred alternative).

⁴⁰ 49 U.S.C. § 303.

⁴¹ *Citizens to Preserve Overton Park, Inc. v. Volpe (Overton Park)*, 401 U.S. 402, 413 (1971).

⁴² See *id.* at 412.

⁴³ See 49 U.S.C. § 47101(c)(1).

⁴⁴ *Id.* § 47106(c)(1)(B).

meet project objectives.⁴⁵ Such a mandate demonstrates concern for environmental impacts while also meeting the AIA's goals of increasing capacity and reducing delays at airports.⁴⁶

When evaluating an agency's interpretation of a statute it administers, courts engage in a two-step *Chevron* analysis.⁴⁷ At *Chevron* step one, courts determine if Congress unambiguously directed an agency to act in carrying out a statute.⁴⁸ If the statute is ambiguous, leaving room for agency expertise and interpretation in the execution of a statutory mandate, courts move to step two and will defer to that interpretation so long as it is reasonable.⁴⁹ Therefore, a *Chevron* analysis would require the D.C. Circuit in *City of Dania Beach* to assess if Congress was ambiguous in using the word "prudent" in § 47106 and, if so, whether FAA's interpretation was reasonable.⁵⁰

To ensure compliance with NEPA requirements for airport actions, FAA developed an interpretive manual through notice and comment, Order 5050.4B (Order).⁵¹ In the Order, FAA offers guidance on EISs for projects covered by § 47106 and other statutes, including § 4(f) of the Department of Transportation Act, which protects parks and other sites of local, state, or national significance.⁵² Although the two statutes address different land types, the Order indicates that when determining the prudence of an option under § 47106, FAA's discussion of the term "prudent" as applied to § 4(f) projects is "very useful."⁵³ To determine whether a project is "prudent" under § 4(f), the Order out-

⁴⁵ See *City of Dania Beach v. FAA*, 628 F.3d 581, 588 (D.C. Cir. 2010); *NRDC*, 564 F.3d at 565.

⁴⁶ See 49 U.S.C. § 47101 (2006); *City of Dania Beach*, 628 F.3d at 588.

⁴⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); see *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 840, 866 (1984).

⁴⁸ *Brown & Williamson*, 529 U.S. at 132.

⁴⁹ See *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *Brown & Williamson*, 529 U.S. at 132.

⁵⁰ See 628 F.3d at 586.

⁵¹ *NRDC*, 564 F.3d at 563. The Order is an agency manual that provides guidelines and direction for agency officials in carrying out the AIA's statutory mandate. FAA, ORDER 5050.4B: NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) IMPLEMENTING INSTRUCTIONS FOR AIRPORT ACTIONS, at Intro.-1 (2006), available at http://www.faa.gov/airports/resources/publications/orders/environmental_5050_4/media/5050-4B_complete.pdf [hereinafter ORDER].

⁵² 49 U.S.C. § 303(c) (2006); ORDER, *supra* note 51, at 10-9 to -10. Section 47106 applies to any airport expansion or construction project, which could include areas covered by § 4(f). ORDER, *supra* note 51, at 10-10. Section 4(f) applies to "publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park . . .)." § 303(c).

⁵³ See ORDER, *supra* note 51, at 10-9 to -10.

lines seven questions an official should consider, all involving extraordinary problems.⁵⁴ Thus, the Order's guidance follows the holding of *Overton Park* and sets a high bar for finding an alternative imprudent under § 4(f).⁵⁵

While the *Chevron* doctrine applies to agency interpretations of statutory language, other cases provide guidance on the level of deference courts should provide other agency actions.⁵⁶ In *Auer v. Robbins*, the Supreme Court upheld the interpretation of a regulation regarding overtime exemptions because the interpretation was fair, reasonable, and lawful.⁵⁷ This highly deferential standard holds that an agency's interpretation of its own ambiguous regulation deserves deference to the extent it is reasonable and in accordance with the statute.⁵⁸

In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court rejected the Ninth Circuit's claim that *Chevron* analysis did not apply when a previous case held a statutory term was ambiguous but offered a preferred definition.⁵⁹ The Court held a lower court's prior interpretation of a statutory term only trumps a later agency statutory construction otherwise deserving *Chevron* deference if the prior court found the statute unambiguous.⁶⁰ Concerned that judicially imposed definitions of vague words would preclude agencies

⁵⁴ See *id.* at 10-10. The seven questions agency officials are to consider are:

1. Does it meet the project's purpose and need?
2. Does it cause extraordinary safety or operational problems?
3. Are there unique problems or truly unusual factors present with the alternative?
4. Does it cause unacceptable and severe adverse social, economic, or other environmental impacts?
5. Does it cause extraordinary community disruption?
6. Does it cause added construction, maintenance, or operational costs of an extraordinary magnitude? or
7. Does it result in an accumulation of factors that collectively, rather than individually, have adverse impacts that present unique problems or reach extraordinary magnitudes?

Id.

⁵⁵ See *Overton Park*, 401 U.S. at 413; ORDER, *supra* note 51, at 10-10.

⁵⁶ William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098 (2008).

⁵⁷ See 519 U.S. 452, 461-62 (1997).

⁵⁸ *Id.* at 461.

⁵⁹ 545 U.S. 967, 982 (2005).

⁶⁰ *Id.*

from interpreting vague statutes, the Court noted that “it is for agencies, not courts, to fill statutory gaps.”⁶¹

In addition, FAA previously faced challenges to its approvals of runway expansion plans.⁶² Prior to *City of Dania Beach*, the United States Court of Appeals for the Second Circuit heard a similar case, *Natural Resources Defense Council v. FAA*.⁶³ Challenging FAA’s decision to relocate an airport through an emergency motion to stay, petitioners argued *Overton Park* barred FAA’s consideration of non-environmental factors to determine prudence.⁶⁴ Although the Supreme Court established the parameters for determining prudence under § 4(f), the Second Circuit held this definition did not extend to § 47106.⁶⁵ Despite use of the same word, differences in the types of lands implicated,⁶⁶ the nature of the projects,⁶⁷ and the built-in constituencies that would be directly affected by the land use⁶⁸ precluded applying the same definition.⁶⁹

Petitioners in *City of Dania Beach* echoed the argument in *NRDC*, claiming that “prudent” was not an ambiguous term.⁷⁰ Under this view, a court’s inquiry would stop at *Chevron* step one without considering whether FAA’s interpretation was reasonable.⁷¹

III. ANALYSIS

The court in *City of Dania Beach* dismissed petitioners’ claims, as jurisprudence under both *Chevron* and *Auer* support deference to agency interpretation of ambiguous words.⁷² Although the concurrence looks to legislative history to show the *Overton Park* definition of “prudent” should apply, the two statutes in question address different

⁶¹ *Id.*

⁶² *See, e.g., NRDC*, 564 F.3d at 551–52.

⁶³ *See id.*

⁶⁴ *Id.* at 554, 565.

⁶⁵ *Id.* at 566.

⁶⁶ *Id.* (comparing public parks with “any land with natural resources”).

⁶⁷ *Id.* (comparing the relative ease of siting highway projects with the complexity of siting airports).

⁶⁸ *NRDC*, 564 F.3d at 566. (comparing community costs of use parkland with the higher immediate cost of using private land).

⁶⁹ *Id.*

⁷⁰ *See City of Dania Beach*, 628 F.3d at 586.

⁷¹ *See Brown & Williamson*, 529 U.S. at 132; *City of Dania Beach*, 628 F.3d at 586.

⁷² *City of Dania Beach v. FAA*, 628 F.3d 581, 586–87, 589 (D.C. Cir., 2010); *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

resources and types of land.⁷³ Although both statutes pertain to transportation projects, their differences require flexibility in implementation.⁷⁴

Petitioners pointed to *Overton Park*, where the Supreme Court found a project under § 4(f) was only imprudent when extraordinary and unusual issues were present.⁷⁵ Arguing that the two uses of the word were linked by both common sense and by the Order, petitioners claimed FAA's dismissal of Alternative C1 was thus an arbitrary or capricious decision in violation of the Administrative Procedure Act.⁷⁶

Although the court remarked that petitioners had a "seemingly common sense" argument that the words should have the same meaning, the difference in the type of land covered by the two statutes created a distinction which thwarted application of a common definition.⁷⁷ Section 4(f) applies to public lands without a necessarily strong constituency, warranting a stricter meaning for finding an alternative not "prudent."⁷⁸ In contrast, § 47106 applies to any lands involved in an airport expansion project, including private lands with a built-in protective interest.⁷⁹ Thus, the court accepted FAA's laxer interpretation of the term "prudent" under § 47106.⁸⁰

Noting that all proposed alternatives had some environmental impact, the court found FAA could consider non-environmental impact when determining its preferred alternative.⁸¹ Because FAA engaged in this balancing test, FAA's finding that Alternative C1 was imprudent was itself not arbitrary or capricious.⁸² Indeed, the difference in environmental impacts between the two options was relatively minimal—0.01 acres of wetland—so the agency decision rested on meeting project goals.⁸³ The court noted "that where protected resources are on *both* sides of the balance, the FAA may properly consider not only the non-environmental defects of the environmentally preferred option, but

⁷³ See 49 U.S.C. § 303(c) (2006); 49 U.S.C. § 47106(c)(1)(B) (2006); *City of Dania Beach*, 628 F.3d. at 593 (Rogers, J., concurring); *Natural Res. Def. Council v. FAA (NRDC)*, 564 F.3d 549, 566 (2d Cir. 2009).

⁷⁴ See *City of Dania Beach*, 628 F.3d. at 587.

⁷⁵ See *id.* at 586.

⁷⁶ See 5 U.S.C. § 706(2)(A) (2006); *City of Dania Beach*, 628 F.3d at 586, 588.

⁷⁷ See *City of Dania Beach*, 628 F.3d at 586–87.

⁷⁸ See *id.* at 587.

⁷⁹ *Id.* at 587.

⁸⁰ *Id.*

⁸¹ *Id.* at 588.

⁸² See *id.* at 589.

⁸³ *City of Dania Beach*, 628 F.3d. at 588.

also the margin by which its environmental advantages exceed those of the alternative.”⁸⁴

The *City of Dania Beach* court also considered petitioners’ argument that the Order gave the same definition to “prudent” in § 4(f) and § 47106.⁸⁵ FAA argued that, although the Order explained the test for a prudent alternative under § 4(f) was helpful for a similar calculation under § 47106, it “[did] not equate the two.”⁸⁶ When evaluating agency interpretations of its own regulations, courts employ the *Auer* test of deference, deferring to an agency interpretation if reasonable, consistent, and not only advanced for litigation purposes.⁸⁷ In evaluating FAA’s argument, the court looked to *NRDC*, where that court found the *Overton Park* definition of “prudent” did not control the definition under § 47106.⁸⁸ In its brief in *NRDC*, FAA also demonstrated that the Order did not equate the two uses of “prudent.”⁸⁹ Because FAA demonstrated its argument in *City of Dania Beach* was consistent, reasoned, and not a post hoc rationalization, the D.C. Circuit upheld FAA’s interpretation.⁹⁰

Finding FAA’s determination that Alternative C1 was imprudent under § 47106 permissible under administrative law jurisprudence, the court rejected petitioner’s challenge to selection of Alternative B1b.⁹¹ The court’s decision is in line with *NRDC*, which promotes judicial deference to an agency’s reasoned, consistent, and forward-looking interpretation.⁹² Such deference meets the Administrative Procedure Act’s mandate for courts to overturn agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” by restricting actions outside the spirit and letter of the law while still permitting flexibility.⁹³

In a dissent in part and concurrence in the judgment, Judge Rogers rejected the majority’s argument regarding the definition of “prudent.”⁹⁴ Instead, he argued § 47106 and § 4(f) shared a “common

⁸⁴ *Id.*

⁸⁵ *Id.* at 586.

⁸⁶ *Id.*

⁸⁷ See *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997).

⁸⁸ *City of Dania Beach*, 628 F.3d at 586–87.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.* at 586, 591.

⁹² See *id.* at 587.

⁹³ See 5 U.S.C. § 706(2)(A) (2006); *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001).

⁹⁴ *City of Dania Beach*, 628 F.3d at 592–93 (Rogers, J., concurring).

raison d'être" and thus should be afforded the same meaning.⁹⁵ Further, he stated that FAA's own linking of the term "prudent" in the Order also demonstrated that the § 4(f) definition of "prudent" should apply to § 47106 decisions.⁹⁶ Judge Rogers cited Supreme Court cases encouraging finding the same meaning.⁹⁷

The cases cited by Judge Rogers, however, only applied to a court's interpretation of a statutory phrase, not an agency's.⁹⁸ When Congress entrusts an agency to administer a statute, courts have recognized that a thorough, consistent, and careful articulation by the agency should receive some form of deference.⁹⁹ Failure to consider the agency's position could encroach upon the separation of powers that protects the legislative branch's ability to delegate lawmaking authority pursuant to an "intelligible principle" free from judicial overriding.¹⁰⁰

Despite Judge Rogers's argument, the court's decision best supports the Supreme Court's avoidance of rigid, judicially-imposed definitions in areas where a court is not the expert.¹⁰¹ Judge Rogers argues that the term "prudent" should be given the same definition as established by the Court in *Overton Park*, as Congress did not expressly require a different meaning for the word.¹⁰² However, just as Congress did not require a different meaning, the AAIA and its legislative history does not demonstrate the word was used with a specific purpose.¹⁰³ The Supreme Court in *Brand X* noted that *Chevron's* premise "is for agen-

⁹⁵ *Id.* at 593 (Rogers, J., concurring) (quoting *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973)).

⁹⁶ *Id.* at 593 (Rogers, J., concurring).

⁹⁷ See *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Dabit*, 547 U.S. 71, 84–85 (2006); *Smith v. City of Jackson*, 544 U.S. 228, 233–34 (2005); *Northcross*, 412 U.S. at 427.

⁹⁸ *City of Dania Beach*, 628 F.3d at 593 (Rogers, J., concurring); see *Merrill Lynch*, 547 U.S. at 84–85 (addressing various court interpretations of a securities statute); *Smith*, 544 U.S. at 233–34 (addressing court interpretation of statutory age discrimination language); *Northcross*, 412 U.S. 427 (addressing a court's interpretation of a statute regarding attorney's fees).

⁹⁹ See *Mead*, 533 U.S. at 228.

¹⁰⁰ See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

¹⁰¹ See Eskridge, *supra* note 56, at 1144.

¹⁰² *City of Dania Beach*, 628 F.3d at 593 (Rogers, J., concurring) ("Congress gave no indication in the AAIA that it intended a different meaning, which it easily could have done, much less that it intended to water down the high hurdle that the Supreme Court identified in *Overton Park*.").

¹⁰³ See e.g., H.R. REP. NO. 97–760, at 710–11 (1982) (Conf. Rep.), reprinted in 1982 U.S.C.C.A.N. 1190, 1473–74; S. REP. NO. 97–494, pt. 2, at 19 (1982), reprinted in 1982 U.S.C.C.A.N. 1156, 1178.

cies, not courts, to fill statutory gaps.”¹⁰⁴ Allowing courts to extend definitions to control similar words in separate statutes would calcify portions of statutory law whereas continued flexibility allows more customized and practical results.¹⁰⁵

From a policy perspective, allowing regulatory flexibility across administrative agencies can lead to environmental benefits.¹⁰⁶ Such flexibility permits agencies to utilize subject matter expertise to meet an individual project’s goals.¹⁰⁷ Just as FAA, an expert in aviation issues, receives deference on aviation issues under current administrative law jurisprudence, EPA receives deference on environmental issues.¹⁰⁸ Allowing courts to freeze definitions of statutory terms would undercut the authority of all agencies, including EPA.¹⁰⁹ Further, such deference allows agencies to make judgments tailored to the nuances of an issue, such as *City of Dania Beach*’s drastic difference in delay reduction and increased capacity compared with the minor difference in environmental impacts between alternatives.¹¹⁰

Overton Park applied to protection of public parks and other significant lands, where low costs for building mandated a high threshold for finding imprudence.¹¹¹ As the vigorous opposition from local citizens and nearby municipalities regarding the FLL runway expansion demonstrates, each alternative considered has vocal supporters and detractors, helping ensure all sides would be fairly heard.¹¹² The meaning of “prudent” is contextual, and Congress delegated authority to FAA to best determine how to incorporate this environmental consideration to carry out the AAIA.¹¹³

¹⁰⁴ *Brand X*, 545 U.S. at 982.

¹⁰⁵ *See id.* at 983.

¹⁰⁶ *See, e.g.*, *Citizens Coal Council v. EPA*, 447 F.3d 879, 890–91 (6th Cir. 2006); *Rybachek v. EPA*, 904 F.2d 1276, 1284 (9th Cir. 1990); Michael J. Brennan et al., *Square Pegs and Round Holes: Application of the “Best Scientific Data Available” Standard in the Endangered Species Act*, 16 TUL. ENVTL. L.J. 387, 418–19 (2003); Thomas O. McGarity, *The Goals of Environmental Legislation*, 31 B.C. ENVTL. AFF. L. REV. 529, 531–32, 554 (2004).

¹⁰⁷ *See, e.g.*, *West Virginia v. EPA*, 362 F.3d 861, 870 (D.C. Cir. 2004) (upholding EPA’s use of model projections based on agency expertise and explanation); *Rybachek*, 904 F.2d at 1284–85 (upholding EPA’s assertion of expertise and authority over a certain kind of mining to meet Clean Water Act goals).

¹⁰⁸ *See Brand X*, 545 U.S. at 982.

¹⁰⁹ *See id.* at 983.

¹¹⁰ *See City of Dania Beach*, 628 F.3d at 588.

¹¹¹ *See Citizens to Preserve Overton Park, Inc. v. Volpe (Overton Park)*, 401 U.S. 412–13 (1971).

¹¹² *See City of Dania Beach*, 628 F.3d at 583–84.

¹¹³ *See id.* at 587–88.

CONCLUSION

While the term “prudent” was used in both § 4(f) of the Department of Transportation Act and § 47106 of the AAIA, the scope of the statutes, the length of time between their enactment, and FAA’s recognition and accounting for this difference in its own regulations all support the majority’s holding that the terms should not be given the same meaning.¹¹⁴ Congress delegated to FAA the authority to carry out the AAIA, incorporating environmental considerations.¹¹⁵ In using a relatively common word, “prudent,” FAA has consistently recognized a similarity between considerations under both § 4(f) of the Department of Transportation Act and § 47106 of the AAIA, but has articulated that the two should be treated differently.¹¹⁶

As Supreme Court precedent demonstrates that agencies, not courts, should fill statutory gaps, upholding FAA’s decision speaks to the larger goal of maintaining regulatory flexibility.¹¹⁷ In the long term, such flexibility will allow an agency to provide the informed judgment upon which its expertise is based.¹¹⁸

¹¹⁴ See *supra* notes 63–68 and accompanying text.

¹¹⁵ See 49 U.S.C. § 47106(c)(1) (2006).

¹¹⁶ See *City of Dania Beach v. FAA*, 628 F.3d 581, 586–87 (D.C. Cir., 2010).

¹¹⁷ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

¹¹⁸ See *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001).

